STATE OF CALIFORNIA

PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

DOCKET FILE COPY ORIGINAL

EX PARTE OR LATE FILED

September 13, 1994

VIA FEDERAL EXPRESS

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Honorable William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20036

94-105

Re: PR File No. 94-SP3; Ex Parte Presentation

Dear Mr. Caton:

In accordance with 47 C.F.R. § 1.1206(a)(1), I am submitting herewith two copies of the attached enclosures.

On September 9, 1994, members of the Private Radio Bureau asked the California Public Utilities Commission ("CPUC") to provide further information concerning its Request for Proprietary Treatment of Documents Used In Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates in the above-referenced matter. The CPUC was also requested to provide copies of publicly available state administrative law judge rulings outlining a nondisclosure agreement arrangement governing information provided to the CPUC on a confidential basis by the cellular industry in a CPUC formal investigation of the cellular industry. Finally, the CPUC agreed to review its petition filed in the above-referenced matter in order to ascertain whether certain material redacted therefrom was otherwise publicly available.

The attached enclosures were provided in response to these requests.

Respectfully submitted,

Ellen S. LeVine
Principal Counsel

ESL:bjk

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STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
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DOCKET FILE COPY ORIGINAL

September 13, 1994 **VIA FEDERAL EXPRESS**

[redacted]

Regina Harrison
Private Radio Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20036

RECEIVED
SEP 14 1994
FCC MAIL ROOM

Re: PR File No. 94-SP3

Dear Ms. Harrison:

On September 9, 1994, you requested that the California Public Utilities Commission ("CPUC") provide additional information in connection with its Request for Proprietary Treatment of Documents Used In Support of Petition To Retain Regulatory Authority Over Intrastate Cellular Service Rates ("Request for Proprietary Treatment"), filed in conjunction with its petition in the above-referenced docket. This letter and attached enclosures are provided in response to that request.

First, per your request, we have referenced those portions of the CPUC's Petition to Retain State Regulatory Authority Over Intrastate Cellular Service Rates which correspond to the particular exemption under Section 0.457 of the Rules and Regulations of the Federal Communications Commission ("FCC"), 47 C.F.R. §0.457 asserted by the CPUC in its Request for Proprietary Treatment:

Specifically, on pages 29-34, 40-41, 51-54 and in Appendices E,F,H,J and M, the CPUC invoked Section 0.457(d)(2)(i) which provides that materials may be submitted under a request for nondisclosure if they contain "commercial, financial or technical data which would customarily be guarded from competitors." The CPUC also has invoked Section 0.457 which provides that certain materials may be specifically exempted from disclosure under statute.

As the CPUC explained in its Request for Proprietary Treatment, the data redacted on these pages and appendices was provided by the cellular industry to the CPUC based on claims that such data was commercially sensitive and hence, proprietary. Accordingly, in compliance with Section 583 of the Public Utilities Code and the CPUC's General Order 66-C, the administrative law judge in the CPUC's Investigation ("I.") 93-12-007, Wireless OII, treated this data as confidential until further order of the CPUC.

We have enclosed copies of two administrative law judge ("ALJ") rulings in I. 93-12-007 which adopted a nondisclosure agreement arrangement under which parties to the proceeding are permitted to review materials and data submitted by the cellular carriers on a confidential basis to the CPUC. The ALJ rulings are subject to a final determination by the CPUC whether public disclosure of such materials is in the public interest in accordance with Section 583 of the Public Utilities Code. We have provided a copy of Section 583 for your reference.

As we indicated to you, the CPUC itself has no independent interest in continuing to treat this data as confidential. However, in an abundance of caution, in filing its petition with the FCC, the CPUC submitted this data under seal on the grounds asserted by the industry.

Continuing, on pages 42, 45 and 75, the CPUC has invoked Sections 0.457 (c) and (e). As the CPUC explained in its Request for Proprietary Treatment, these materials were furnished to the CPUC by the Attorney General of the State of California gathered in the course of its ongoing investigation of the cellular industry to determine compliance with antitrust laws. In particular, the Attorney General cited California Government Code Section 11181 for authority in providing these materials, deemed proprietary by the cellular industry, to another governmental agency. We have attached a copy of Section 11181 for your reference.

At the request of the state attorney general, the CPUC agreed to file any information obtained from these materials and included in the CPUC's petition under seal with the FCC. (See Letter from State Attorney General attached to Request for Proprietary Treatment.)

In addition to the above, at your request, the CPUC agreed to review its petition to ascertain whether certain material redacted therefrom was otherwise publicly available. On pages 53 and 59-60 we found that we had inadvertently redacted information about MCI's proposed investment in Nextel (which has since been withdrawn) and information obtained from an NTIA report. We have enclosed an original and eleven unredacted copies of these pages.

Moreover, the CPUC discovered in its review that the pricing data redacted from pages 34-35, 41-45, 49 and Appendices I and J, and furnished to the CPUC under a request for confidentiality by the cellular industry, was in fact fully derived from tariffs

publicly filed with the CPUC.[1] The CPUC made this discovery by analyzing the data provided by the industry with the publicly-filed tariffs.[2]

The CPUC administrative law judge's ruling specifically provides that rate information derived from publicly available tariff data shall not be subject to confidential treatment. (ALJ Ruling at 3, I. 93-12-007, dated July 15, 1994). Accordingly, the CPUC hereby encloses an original and eleven unredacted copies of the pages and appendices in its petition which were derived from publicly-filed tariffs.

Please call me if you require any additional information or have any questions.

Sincerely,

Ellen S. LeVine
Principal Counsel

ESL:bjk

Attachments

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1 The CPUC initially believed that some of the data provided by the cellular industry was proprietary.

2 In analyzing the data submitted by the industry with that contained in the public tariffs, the CPUC noted a number of errors made by the industry. Accordingly, the CPUC corrected its study and appendices to reflect the correct data from the tariffs. The revisions, however, had no significant effect on the CPUC's conclusions about the non-competitiveness of the cellular industry in California.

TRP/gab

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING MOTION FOR MODIFICATION OF JULY 19, 1994 RULING

Administrative Law Judge (ALJ) ruling of July 19, 1994 granted the motions, in part, for confidential treatment of data submitted by certain cellular carriers (respondents)[1] in response to ALJ data requests in this proceeding. The ruling directed respondents to provide the confidential data to the Cellular Resellers Association (CRA) under a nondisclosure agreement.

On July 26 and 27, 1994, additional motions were filed by certain of the respondents requesting modification or clarification of the July 19 ALJ ruling. Still concerned over publicly disclosing certain data which the July 19 ruling deemed to be nonconfidential, certain respondents redacted the information described in Categories 1(b)(1), (2), and (3) on page 6 of the ruling from the copy provided to CRA. Categories 1(b)(1) and (2) concern data on the number of aggregate subscribers on each carrier's discount plans and basic rate plans, respectively. Category 1(b)(3) concern the number of aggregate subscribers of the company in total, broken down between wholesale and retail service.

The July 19 ruling designated this data nonconfidential since it disclosed only aggregate subscriber numbers, but not customer numbers on any single discount plan. Thus, competitors

1 Respondents filing separate motions include AirTouch Cellular (AirTouch), Bay Area Cellular Telephone Company (BACTC) McCaw Cellular Communications (McCaw), and US West Cellular (US West). Respondents filing joint include GTE Mobilenet (GTE), Fresno MSA, Contel Cellular, and California RSA No. 4.

would not be able to learn which particular discount plan(s) were more popular with subscribers with the intent of emulating them for competitive advantage. In lieu of disclosing this information, the respondents filed motions for modification of the ruling. The procedure for filing the motions was approved by the ALJ by phone call with certain carriers' representatives prior to the motions being filed.

On July 29, an interim ruling was issued temporarily staying the portions of the July 19 ruling for which respondents sought reconsideration, pending an opportunity for comment by other parties by August 3, 1994. The July 19 ruling also directed public disclosure of the percentages--as opposed to specific numbers of customers--applicable to the various categories of data cited in parties' motions. This ruling grants the motions of the respondents for reconsideration, as noted below.

Positions of Parties

Respondents request that the Commission treat the information in categories 1(b)(1), (2), and (3) of the July 19 ruling as confidential, and that the ruling be revised accordingly. Respondents argue that if this data is not kept confidential, competitors will have sufficient information to fully and accurately calculate the market share of the respondent providing the data, and use such information to the competitive harm of the party providing the data.

Although the July 19 ruling provided for only the number of aggregate subscribers to be publicly disclosed, respondents contend that even the types of aggregate data called for by the ALJ ruling are of so specific as to render them very valuable to competitors who could use them to analyze the carrier's business operations. Disclosure of such information to competitors would allow them to tailor their marketing plans in response to the carrier's subscribership pattern. A competitor may also structure an advertising sales message claiming superiority over the carrier

based on total subscribers or number of subscribers by a specific customer segment or growth rate of total subscribers.

On August 3, two parties, Cellular Carriers' Association of California (CCAC) and CRA filed responses to the July 26/27 motions. CCAC supports respondents' motions. CCAC contends that any inadequate showing of competitive harm in the initial motions has since been remedied by the justifications provided in the motions for modification. According to CCAC, "imminent and direct harm" would result from disclosure of the disputed customer information to competitors who could then use it to tailor their own discount plans and marketing strategies accordingly. CCAC asserts that no competitor should be compelled to divulge to its competition what amounts to a blue print of its subscriber area strengths and weaknesses. CCAC also disputes that public disclosure of the disputed data promotes a "fully open regulatory process" since only cellular carriers--and not other wireless service providers--are being compelled to disclose sensitive data. CCAC submits that it is unfair to require such disclosure from some providers and not others, and that compelling such disclosure will compromise the healthy competition which the Commission seeks to foster.

CRA opposes the motions for modification of the July 19 ALJ ruling, and argues that there has been no showing of "imminent and direct harm of major consequence" from disclosure of the data. CRA observes that not all the carriers have objected to provide the requested data in aggregate form. For example, California RSA #2 provided the data to CRA without complaint. Likewise, Los Angeles Cellular Telephone Company (LACTC) did not object to providing the noted data. CRA also disputes, in particular, US West's claims of competitive harm, noting that US West has announced a joint venture with its San Diego duopoly competitor, AirTouch. CRA also contends that mere knowledge of aggregated subscriber information would not be usable by competitors to gain any advantage over carrier making

the disclosure since the subscriber would not know which plans subscribers are utilizing.

Discussion

As stated in the earlier July 19 ruling, the standard for ruling on parties' motions for confidential treatment is whether public disclosure would cause "imminent and direct harm of major consequence." The risk of such harm is to be balanced with "the public interest of having an open and credible regulatory process." (In Re Pacific Bell 20 CAL PUC 237, 252). Examples of information considered to cause such harm includes customer lists, prospective marketing strategies, and true trade secrets.

It is concluded that based on the additional explanation presented by respondents, in their motions of July 26/27, the data referenced in categories 1(b)(1), (2), and (3) of the July 19, 1994 ALJ ruling should be restricted from public disclosure and treated confidentially. Parties may still obtain access to this confidential data, but only through execution of an appropriate nondisclosure agreement.

As explained by the July 26/27 motions, however, the problem of significant competitive harm is not eliminated merely by requiring the data to be disclosed in the aggregate. Even though in aggregate form, the disclosure of absolute numbers would still reveal the relative market shares of each respondent in each of the service areas identified in the original ALJ data request. Knowledge of market share could be used by a competitor to structure an advertising message claiming superiority over the carrier, based on total subscribers. If a competitor knew a carrier's specific number of subscribers by market area applicable to the various categories referenced in the July 19 ruling, it could assess the carrier's strengths and weaknesses and adjust its marketing strategy accordingly.

The only party to file an objection to respondents' motions was CRA. As one reason for its objection, CRA cites the

fact that at least two carriers, California RSA #2, Inc. and LACTC did not object to providing the data on aggregate numbers of customers. The willingness of these carriers to publicly disclose the data for their own operations does not, of itself, prove that similar disclosure by other carriers would not cause them competitive harm. The basis for deciding the motions at issue are the claims of competitive harm that would result for those carriers who did file motions. There is no basis to speculate regarding why other carriers chose for whatever reason not to object to releasing various forms of data. On this basis of the filed motions, the carriers have provided adequate justification.

CRA also cites the announcement of a joint venture between US West and its only duopoly competitor, AirTouch as additional evidence justifying public disclosure of the data. According to CRA, US West's position amounts to nothing less than AirTouch can have this competitive information, but the public or any other competitor cannot. Thus, CRA appears to concede that the information has competitive value, but seeks to have it publicly disclosed anyway so all prospective competitors can have equal opportunity to competitively benefit from the information, not just AirTouch. By advancing this argument, CRA actually lends credence to carriers' arguments that the data does, in fact, have commercially sensitive value to competitors. The fact that US West voluntarily decides to share certain data with AirTouch in connection with a joint venture is its proprietary right. It does not follow that US West should be required to disclose commercially sensitive data to other competitors with whom it has no joint venture interests.

As a final argument, CRA claims that since the data would only disclose aggregated numbers, it cannot be construed to be a "trade secret." Since the aggregated data would not disclose which billing plans a subscriber utilized, CRA argues that a competitor would not be able to use the data for competitive gain.

Yet, the additional arguments presented by the carriers show that there is an economic value in knowledge of the aggregate number of subscribers to the extent it indicates a carrier's market share in particular market areas and total number of subscribers on discount plans in given market areas. Such information can be reasonably classified as "trade secrets." As defined under the Uniform Trade Secrets Act, codified in the California Civil Code, § 3426 et seq., a "trade secret" is:

> "information ....that derives independent economic value, actual or potential, from not being generally known to the public...and that is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Accordingly, to the extent the information on numbers of subscribers has significant economic value to competitors, it can properly be considered as "trade secrets" under the Uniform Trade Secrets Act. In the interests of promoting a more competitive market, carriers should be allowed to protect the confidentiality of such competitively sensitive information.

Procedures for Third-Party Access to Carriers' Data Responses

In its motion, BACTC also requests that the Commission clarify the procedure to be followed for making non-confidential data available to the public while preserving the confidentiality of information deemed proprietary under General Order (GO) 66-C. BACTC notes that although the ALJ ruling establishes a procedure to provide the publicly available information in the data request to CRA, no procedure was explained whereby the non-confidential data is to be made available to other parties. BACTC proposes that all data produced in response to the ALJ rulings of April 11, 1994 and April 22, 1994 be physically segregated from the public documents in the formal proceeding files. BACTC also proposes that parties go through the respective carriers to request access to the data responses.

No other party commented on BACTC's proposal as to procedures for Commission custody of the data, and third-party access. BACTC's request for clarification of procedures for providing data to third parties is addressed in the ruling below.

IT IS RULED that:

1. The motions of the respondents to modify the July 19, 1994 ruling are granted with respect to the confidentiality of information designated as categories 1(b)(1) (2), and (3) in the July 19 ruling as described above.

2. The July 19, 1994 ruling is revised as follows: The information on aggregate numbers of subscribers indicated in categories 1(b)(1), (2), and (3) of the ruling shall be subject to the confidentiality provisions of GO 66-C and Public Utilities Code § 583, applicable to those respondents filing motions for reconsideration.

3. This confidential information shall be provided to CRA pursuant to the nondisclosure agreement as explained in the July 19 ruling.

4. Any party, other than CRA, interested in obtaining a copy of the redacted version of the data responses provided by the carriers in this proceeding shall directly contact the respective carriers to obtain such copies, not Commission staff.

5. The carriers shall promptly provide to any party who makes a specific request, a copy of all redacted data responses produced by carriers in this proceeding.

6. Any party, other than CRA, interested in obtaining a copy of the unredacted confidential version of the data responses provided by the carriers in this proceeding shall do so by contacting the respective carriers and executing a nondisclosure agreement as prescribed in the July 19 ruling. Confidential copies shall not be available through the Commission.

Dated August 8, 1994, at San Francisco, California.

/s/ THOMAS R. PULSIFER
Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Motion for Modification of July 19, 1994 Ruling on all parties of record in this proceeding or their attorneys of record.

Dated August 8, 1994, at San Francisco, California.

/s/ GABRIELLE NGUYEN
Gabrielle Nguyen

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number of the service list on which your name appears.

Historical Note

Derivation: Stats.1915, c. 91, p. 131, § 28.

Cross References

Production of out of state records, see § 313.

Notes of Decisions

1. Construction and application

It is necessary for the public authorities whose duty it is to regulate public utilities to have a complete disclosure of all the affairs of such utilities, and it is advisable, from the standpoint of the utility, to have such information at hand concerning its own business as will be designated to aid public authorities in according fair treatment. Mt. Whitney P. & E. Co. v. Tulare Co. P. Co. et al. (1912) 1 C.R.C. 285.

§ 583. Information confidential; disclosure of information; misdemeanor

No information furnished to the commission by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

(Stats.1951, c. 764, p. 2047, § 583.)

Historical Note

Derivation: Stats.1915, c. 91, p. 131, § 28.

Library References

Records ⇐14. C.J.S. Records § 35 et seq.

Notes of Decisions

1. In general

Coded information from the background data of staff reports entered in evidence in minimum rate proceedings should be made available for cross-examination purposes by the commissioner or hearing examiner upon proper showing of a compelling need, but should coding foreclose interested parties from obtaining essential material information may be furnished even though the source of such material must be identified. Petition of Anderson Clayton Co. (1968) 68 Cal.P.U.C. 21.

§ 584. Annual report to commission; monthly report of earnings and expenses; special reports

Every public utility shall annually furnish a report to the commission at such time and in such form as the commission may require in which the utility shall specifically answer all questions propounded by

Notes of Decisions

Investigations 2
Validity 1

1. Validity

Since proceedings under § 11180 et seq. relating to investigations by heads of government departments do not relate to judicial proceedings but to statutorily permitted investigations, the proceedings are not constitutionally invalid because they fail to follow C.C.P. §§ 1985, 2035, which apply to proceedings of judicial nature. Fielder v. Berkeley Properties Co. (1972) 99 Cal.Rptr. 791, 23 C.A.3d 30.

2. Investigations

California attorney general's investigation into possible antitrust violations affecting California in marketing of natural gas originating in Alaska had both interstate and intra-California aspects, and thus while conducting investigation attorney general properly may be concerned not only with possibilities of prosecution in California courts but also with formulations of enforcement policy in cooperation with federal authorities and with recommendations for remedial administrative rulings and legislation, as this section, which empowers attorney general to investigate any subject under his department's jurisdiction, surely empowered attorney general to gather information that was "not plainly incompetent or irrelevant to" those purposes. Younger v. Jensen (1980) 161 Cal.Rptr. 905, 605 P.2d 813, 26 C.3d 397.

Gen. Laws Supp.1939, Act 8780d, lodging with employment commission duty to administer Unemployment Insurance Act, and specifically imposing upon commission duty to do all things reasonably necessary to enforce provisions thereof including power to issue process to compel attendance of witnesses and production of records, necessarily implied investigatory powers. Hill v. Brisbane (1944) 151 P.2d 578, 66 C.A.2d 15.

Under this section and § 11181, director of state department of social welfare has authority to investigate and hold hearings to determine whether unauthorized persons have been engaged in child placement. 23 Ops.Atty.Gen. 35 (1954).

§ 11180.5. Unlawful activities; assistance in conducting investigations

At the request of a prosecuting attorney or the Attorney General, any state agency, bureau, or department may assist in conducting an investigation of any unlawful activity which involves matters within or reasonably related to the jurisdiction of such agency, bureau, or department. Such an investigation may be made in cooperation with the prosecuting attorney or the Attorney General.

(Added by Stats.1977, c. 891, p. 2670, § 1.)

Library References

Administrative Law and Procedure ⇐341. WESTLAW Topic No. 15A.
C.J.S. Public Administrative Law and Procedure §§ 76, 78.

§ 11181. Powers in connection with investigations and actions

In connection with these investigations and actions, the department head may:

(a) Inspect books and records.

(b) Hear complaints.

(c) Administer oaths.

(d) Certify to all official acts.

(e) Issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents and testimony in any inquiry, investigation, hearing or proceeding pertinent or material thereto in any part of the state.

(f) Divulge evidence of unlawful activity discovered, pursuant to this article, from records or testimony not otherwise privileged or confidential, to the Attorney General or to any prosecuting attorney who has a responsibility for investigating the unlawful activity discovered, or to any governmental agency responsible for enforcing laws related to the unlawful activity discovered.

(Added by Stats.1945, c. 111, p. 439, § 3. Amended by Stats.1981, c. 778, p. 3035, § 1; Stats.1987, c. 1453, § 8.)

Historical and Statutory Notes

The 1981 amendment added subd. (f) relating to divulging evidence of unlawful activity.

The 1987 amendment, in subd. (f), added "or to any governmental agency responsible for enforcing laws related to the unlawful activity discovered."

Derivation: Pol.C. § 353, added by Stats. 1921, c. 602, p. 1023, § 1.

Cross References

Administration of oaths and affirmations, see Code of Civil Procedure § 2093 et seq.

Code of Regulations References

Depositions, proceedings before the occupational safety and health appeals board, see 8 Cal. Code of Regs. § 372.3.

Law Review Commentaries

Fair procedure in welfare hearings. David R. Packard (1969) 42 So.Cal.L.R. 600.

Library References

Administrative Law and Procedure ⇐356.
Witnesses ⇐1.
WESTLAW Topic Nos. 15A, 410.
C.J.S. Public Administrative Law and Procedure § 81.
C.J.S. Witnesses § 2 et seq.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

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1. Validity

There is no constitutional objection to a system under which heads of departments of government may compel production of evidence for purposes of investigation without instituting formal proceedings against one from whom evidence is sought or filing any charges against him, but department heads cannot compel production of evidence in disregard of privilege against self-incrimination or constitutional provisions prohibiting unreasonable searches and seizures. Brovelli v. Superior Court of Los Angeles County (1961) 15 Cal.Rptr. 630, 364 P.2d 462, 56 C.2d 524; Fielder v. Berkeley Properties Co. (1972) 99 Cal. Rptr. 791, 23 C.A.3d 30.

2. Investigations

Defendants were subpoenaed pursuant to California attorney general's delegation of authority to conduct investigation into ownership, production, sale and distribution of Alaska natural gas insofar as it affected California to determine existence, nature, and scope of violations of federal and state antitrust laws pertaining to price-fixing, monopolization, division of markets, and restraint of trade, and that clearly was within attorney general's overall authority to investigate matters relating to subjects under his jurisdiction, since possible antitrust violations were subjects under his jurisdiction. Younger v. Jensen (1980) 161 Cal. Rptr. 905, 605 P.2d 813, 26 C.3d 397.

Investigation by head of department of government relating to subjects under jurisdic-

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3. Production of documents

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C.A.3d 669.

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TRP/bwg

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into Mobile Telephone Service and Wireless Communications.	))))	I.93-12-007

ADMINISTRATIVE LAW JUDGE'S RULING GRANTING IN PART MOTIONS FOR CONFIDENTIAL TREATMENT OF DATA

By Administrative Law Judge (ALJ) rulings dated April 11, and April 22, 1994, certain respondents in this proceeding were directed to provide information to the Commission for their cellular operations concerning average subscriber rates, total number of cellular units in service, and capacity utilization rates. Much of the responsive data was provided confidentially pursuant to Commission General Order (GO) 66-C and Public Utilities (PU) Code § 583, but with no justification for the requested confidential treatment.

A subsequent ALJ ruling dated May 5, 1994 directed parties asserting claims of confidentiality under GO 66-C to file a motion by May 16, 1994 providing justification for confidential treatment, based on the standard applied in Pacific Bell, 20 CPUC 2d 237, 252 (1986). Under that standard, confidential treatment would be granted only upon a showing that release of the data would lead to "imminent and direct harm of major consequence, not a showing that there may be harm or that the harm is speculative and incidental." Any party (other than the Commission's Division of Ratepayer Advocates) interested in reviewing any of the data submitted under claims of confidentiality was directed to advise the respective cellular carrier of its interest in entering into a nondisclosure agreement permitting access to such data as required for purposes of this proceeding.

In response to the ALJ ruling, the carriers submitted the requested motions formally requesting confidential treatment for

information provided and offered reasons which they believed justified their confidentiality requests. Some of the carriers disputed the validity of applying a standard as rigorous as that adopted in Pacific Bell for purposes of cellular carriers' confidentiality claims. For example, Bay Area Cellular Telephone Company (BACTC) argues that because cellular carriers face a more competitive environment than was faced by Pacific Bell at the time the cited standard was set, it is not appropriate to hold carriers to such a stringent standard. Yet, because it believes the information provided by the carriers is clearly of such significance to their competitive positions, BACTC argues that the Pacific Bell standard is clearly met anyway, and its legal relevance need not be tested in this case.

Although the carriers agreed generally as to the scope of data to granted confidential treatment, they also expressed some differences of opinion. For example, Los Angeles Cellular Telephone Company (LACTC) does not object to disclosure of the total number of subscriber units as of March 1994, or of the total percentage of units on alternative plans, but does object to disclosure of the precise number of units in each plan, or the minutes of use consumed in each user category. LACTC also has no objection to disclosure of the total number of cell site sectors in operation since this information may be derived from public files. By contrast, the other carriers object to disclosure of both the aggregate number of subscribers on all discount plans as well as the number of subscribers on each individual plan.

Carriers argue that information submitted concerning the number of subscribers under individual payment plans and capacity utilization data is presented in a manner to reveal commercially sensitive information about the carrier's market share and the success of marketing strategies. They contend that disclosure to competitors of detailed information about subscriber response to specific plans would allow competitors to tailor their marketing

plans in response to the carrier's subscribership patterns by pricing plans. Disclosure of subscriber data could enable a competitor to possibly structure an advertising sales message claiming superiority over the competing carrier based on total subscribers or number of subscribers by a specific customer segment. Disclosure of the carriers' capacity utilization data could likewise allow competitors to glean sensitive data as to the configuration and use of the carrier's system as a basis to make planning decisions rather than basing decisions on each competitor's independent analysis of the marketplace.

On May 26, 1994, Cellular Resellers Association, Inc. (CRA) filed a response to the collective motions of the cellular carriers requesting confidential treatment. CRA states that by letters dated May 12, 1994, it requested from each of the carriers to be provided a copy of the data submitted on a confidential basis to the Commission under a nondisclosure agreement. As of May 26, CRA had received data to be held confidentially only from GTE. By letter of May 20, 1994, McCaw refused to provide CRA access to the confidential data even under a nondisclosure agreement. While it has apparently not responded to CRA, BACTC stated in its Motion that it is "fully prepared to disclose even this highly confidential information to counsel for other parties and their designated experts pursuant to customary non-disclosure agreements."

CRA thus requests an ALJ ruling ordering that all of the requested data dated prior to 1992 be publicly released since it would not cause any imminent or direct harm of major consequence. CRA further requests that it be provided all other data for 1992-93 pursuant to a reasonable nondisclosure agreement in the manner agreed to by GTE.

Discussion

Two issues must be resolved relating to nondisclosure of the submitted data. First, what portion, if any, of the data

should be restricted from public disclosure. Second, would disclosure of any of the data to CRA even under a nondisclosure agreement result in competitive harm to cellular carriers?

As to carriers' challenge to the Pacific Bell case as a relevant precedent by which to judge the confidentiality claims of cellular data, no convincing arguments were offered to justify abandoning the standard in this instance. The extent to which cellular carriers are competitive is a contested issue in this proceeding. It would be prejudging this issue to discard the Pacific Bell standard on the premise that cellular carriers are fully competitive. In any event, it has not been shown that even assuming the carriers were competitive, that the standard, itself, should be discarded. If anything, only the determination of how to apply the standard, i.e., what constitutes "imminent and direct harm of major consequence" might be influenced by the degree of competitiveness in an industry. Accordingly, the Pacific Bell standard requiring a showing of "imminent and direct harm of major consequence" is relevant in evaluating the carriers' motions in this instance. Under the Pacific Bell standard, "in balancing the public interest of having an open and credible regulatory process against the desires not to have data it deems proprietary disclosed, we give far more weight to having a fully open regulatory process." (Id. 252.)

It is concluded that the respondents have provided adequate justification for confidential treatment of information on the basis of "imminent and direct harm" relating to certain information only. Confidential treatment is warranted for the number of subscribers associated with specific billing plans and for data relating to capacity utilization, at least for recent periods. As explained above, such information has commercial value to competitors which could be used to the detriment of the carrier disclosing it. On the other hand, carriers have not shown that "imminent and direct harm" will result from disclosure of

information relating to the aggregate number of subscribers associated with all discount plans of a given carrier, or the aggregate number of subscribers serviced by resellers. LACTC, for example, acknowledges that disclosure of aggregate subscribers under all discount plans would not be competitively damaging in its case. No other carrier explained how its circumstances so differed from those of LACTC such that disclosure of such aggregate data could be used to its significant competitive harm.

Carriers generally agree that the rate information in their data responses which is derived from published tariffs can be publicly disclosed without competitive harm. Accordingly, since no basis has been provided to restrict such information, such publicly available tariff data will not be subject to confidential treatment.

CRA argues that data for the period covering 1989-1991 should be publicly released because of its age (almost 2-1/2 years old). CRA's argument is reasonable. Given the rapid pace of technological change and customer growth within the cellular industry, historical data can become quickly outdated and of limited value to competitors in evaluating strategies prospectively. There is little likelihood that historical information as old as from 1989-91 could cause "imminent and direct harm of major consequence" in such a manner.

Regarding the dispute over whether CRA should be granted access to confidential data under a nondisclosure agreement, the following procedure will be adopted. CRA shall be granted access to the data responses provided by carriers on the following terms. A redacted copy of the data responses provided to the Commission by the carriers shall be provided to CRA without the need for a nondisclosure agreement. Information designated confidential under this ruling shall be redacted from the copy provided to CRA.

A separate unredacted version of the data responses disclosing data found to be confidential under this ruling shall be

provided only to designated reviewing representatives of CRA under the terms of an appropriate nondisclosure agreement. The terms under which reviewing representatives shall be designated are outlined in the order below. This approach provides a balance between the need to encourage open public involvement in Commission proceedings versus the need to protect sensitive proprietary data with commercial value to competitors.

IT IS RULED that:

1. The carriers' motions for confidential treatment of submitted data is granted, in part. The data marked confidential and proprietary by the cellular carriers submitted pursuant to ALJ rulings dated April 11 and April 22, 1994 shall be restricted from public disclosure in accordance with General Order 66-C and Public Utilities Code § 583, except for the following:

   a. All data relating to the calendar years 1991 and earlier.

   b. For data relating to calendar years 1992 and 1993, only the following shall be publicly disclosed:

      (1) Aggregate activated subscriber numbers on discount rate plans, without disclosing numbers on individual plans.

      (2) Aggregate activated numbers on basic rate plans.

      (3) Aggregate activated numbers subscribers divided between wholesale and retail service.

      (4) Publicly available tariff information.

      (5) Total number of cell site sectors in operation.

2. Within five business days following issuance of this ruling, a redacted copy of the data responses provided to the Commission pursuant to this proceeding by the carriers shall be

provided to CRA without the need for a nondisclosure agreement. Information designated confidential under this ruling shall be redacted from the copy provided to CRA.

3. A separate unredacted version of the data responses disclosing data found to be confidential under this ruling shall be provided only to designated reviewing representatives of CRA under the terms of an appropriate nondisclosure agreement to be negotiated by the CRA and each of the cellular carriers subject to this ruling.

4. The carriers shall meet and confer with CRA on a timely basis to negotiate the terms of an acceptable nondisclosure agreement.

5. The nondisclosure agreement shall restrict access to confidential data only to designated reviewing representatives to be determined as outlined below.

6. The designated reviewing representatives shall be mutually agreed to by both parties entering into the nondisclosure agreement, based upon the criteria outlined in the order below. A reviewing representative shall be limited to an individual who is:

a. An attorney appearing for CRA in this proceeding who is not representing or advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers; or

b. An attorney, paralegal, and other employee associated for purposes of this proceeding with an attorney described in (a) who is not representing or advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers; or

c. An unaffiliated expert or an employee of an unaffiliated expert retained by CRA for the purpose of advising in this proceeding, except those persons: who are directly

involved in or have direct supervisory responsibilities over the development of reseller marketing plans to compete against cellular carriers.

7. If parties are unable to agree on designation of reviewing representatives based on the above standards, they may seek resolution of the dispute from the assigned ALJ in this proceeding.

Dated July 19, 1994, at San Francisco, California.

/s/ THOMAS PULSIFER
Thomas Pulsifer
Administrative Law Judge

[redacted]

a value of [redacted] in 1989 to a value of [redacted] in 1993, indicating the duopolists are gradually eliminating any competition that might have existed in the retail market.

D. Cellular Pricing

The CPUC examined the prices offered by facilities-based cellular carriers to determine if price levels and price changes were consistent with what we would expect in a competitive market. In this analysis of prices, the CPUC recognizes the proliferation in recent years of various promotional contract plans which purport to offer savings to targeted customer segments. These plans usually require eligible customers to accept various restrictions and conditions, as contrasted with traditional "basic service" plans, which may entail a higher nominal rate but which do not require the restrictions of the discounted plans.

We examined whether cellular rates have changed and whether rate changes by the duopolists are independent of each other. The CPUC has found the following:

- The average rate for the basic plan has remained unchanged in three markets, including California's largest market; increased in one market; and experienced decreases of less than 5 percent in the four other markets studied.
- Facilities-based carriers' basic retail rates are nearly identical in Los Angeles and Santa Barbara and vary by less than 7 percent in all other markets with the exception of Sacramento.

Stagnant or slowly declining cellular rates must be evaluated in the context of lower costs. In real terms, the rates for basic plans in all markets have declined by an average of 14.9 percent, in nominal terms by 0.8 percent. (See Appendix I)